IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 376

FREDERIC W. PROCTER,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITIONER'S REPLY BRIEF.

FREDERIC W. PROCTER,
Petitioner, Pro Se.

THOMAS H. FISHER,
Of Counsel.

UNITED STATES LAW PRINTING COMPANY, CHICAGO

SUBJECT INDEX

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I.

The Alleged Gift was without Computable or Ascertainable Value and was therefore not Subject to Gift Tax.

Respondent's position on this point is contained in the sentence at the end of the completed paragraph on page 10

of his Brief, which reads as follows:

> "Here the petitioner's right to receive the corpora of the trust his grandfather had created depended solely, as regards the *inter vivos* trust, upon his surviving his mother and, as regards the testamentary trust, upon his surviving his mother and reaching the age of 40."

This completely ignores the principal element which renders the amount of the alleged gift incomputable and unascertainable, i. e., that Mrs. Procter may foreclose petitioner's indebtedness (as indeed she is now attempting to do) and thus deprive him of his entire inheritance, *thereby rendering the alleged gift of no value whatever.*

Respondent in his Brief studiously ignores this "key" uncertainty, which causes the alleged gift to be without computable or ascertainable value and therefore not subject to the gift tax.

Quite frankly, we do not see how it advances the argument for the respondent to ignore the entire point made in our petition.

Respondent says (p. 11):

> "Moreover, the value of the gift of the petitioner's future interests here in question was not incapable of valuation either (a) *because such interests were subject to a lien for the debt he owed his mother* or (b) because of the contingency that he might not outlive her." (Italics supplied.)

Respondent is here making the same argument which he made in the Tax Court, i. e., that petitioner's debt to his mother is merely in the form of "a lien" which could not be foreclosed until his mother's death.

The whole point made by petitioner and now concurred in by both the Tax Court and the Circuit Court of Appeals, adversely to respondent's contention, is that petitioner's debt to his mother was due and collectible upon the date of the alleged gift (being by its terms due upon demand, as she now asserts), and not merely upon his mother's death.

It would, we think, have been much franker if respondent had faced the true issue in this case raised by these considerations, instead of blandly ignoring them. For it is our position that if, as the Tax Court and the Circuit Court of Appeals have both found, the debt due petitioner's mother was enforceable at the moment of the alleged gift and not merely at her death, this huge present indebtedness of $686,300.03 introduced an uncertainty or contingency *for which no monetary computation is possible.* For it cannot be denied that should the debt be enforced prior to Mrs. Procter's death, neither petitioner nor his children as his donees will ever receive any gift whatsoever; and it would seem to follow that no gift tax would be due.

Petitioner concludes on this point (p. 13):

> "Thus the taxpayer had interests in the trusts his grandfather had created which were subject to *valuation in terms of money.* That was all that was necessary to the imposition of the tax." (Italics supplied.)

This statement is true *only* if the contingency to which respondent refers in his brief, i. e., the contingency that the debt may be foreclosed, be disregarded. For this statement cannot apply to the contingency of Mrs. Procter's foreclosing petitioner's indebtedness in her lifetime; since by no actuarial or other means is that contingency "subject to valuation in terms of money."

It follows that respondent has avoided and refused to meet the entire first point upon which our petition for certiorari is based.

II.

Article "Eleventh" of the Trust Indenture is not Void as against Public Policy.

Respondent's entire argument on this point is, first, that Article "Eleventh" would "require the federal courts to render *advisory opinions*" and, second, that "in any case, there is no conflict of decisions asserted on this point, and none in fact exists."

We fail to see what the determination of the existence of a liability for gift tax has to do with "advisory opinions" in the federal court. This appears to be a novel addition to the Circuit Court's argument that the enforcement of Article "Eleventh' would "obstruct the adminstration of justice by requiring the courts to pass upon a *moot* case." Apparently respondent agrees with petitioner that this is *not* a moot case. What respondent appears to argue is that there is a real issue over the validity and effect of the transfer, but that this issue has not yet arisen, thus rendering the decision as to tax liability merely "advisory."

We pointed out in our petition (p. 21) that controversies regarding gift taxes between taxpayers and the Commissioner of Internal Revenue arise and are litigated in our courts every day which involve the validity and effect of a transfer to a third person as donee, such as the alleged gift in this case. Such litigation is neither "moot" nor "advisory." Respondent elsewhere implies (p. 13-14) that

these are the same thing and that "Accordingly, the court below held the condition contrary to public policy, and, as such, invalid."

We respectfully submit that they are not the same thing at all; and that in any event the determination of the validity and effect of the condition precedent contained in Article "Eleventh," and the determination of a liability for gift taxes based thereon, is a *present* justiciable controversy of a *present* issue which is *presently* determinable in this proceeding. As such it is neither moot nor advisory.

As for the contention that "there is no conflict of decisions asserted on this point," we have on pages 17 and 18 of our petition cited a long list of authorities holding that such clauses as Article "Eleventh" are legally enforcible conditions precedent to the validity of such a transfer as that upon which the alleged gift in this case is based. It is certainly untrue, therefore, to say that "there is no conflict of decisions asserted on this point" in the light of these numerous authorities directly contrary to the decision in the instant case. For if these authorities are valid, then Article "Eleventh" is a valid condition precedent effective to defeat the transfer into trust in this case; and if the validity of this condition precedent be admitted under the authorities cited in our petition, it must follow that in the event named the gift itself was ineffective and that no gift tax is due.

In view of the very short paragraph devoted in respondent's brief to this important question, we may assume that respondent hopes to "brush the issue aside" as inconsequential by failing in his reply brief to treat this second point as worthy of this Court's consideration.

For our part we take the exactly contrary view, i. e., that this Court's ruling on Article "Eleventh" is a matter of major concern, not only in this case but in any case in which an alleged gift is subject to such a valid condition precedent. In this situation a square conflict between this case and another case *having exactly this same condition precedent* is unnecessary. Respondent's effort to belittle the importance of this question, by saying that no *precisely similar condition precedent* has been before the courts in a gift tax case, cannot affect our answer that the cases cited on pages 17 and 18 of our petition, if they were properly decided, inevitably defeat the liability for gift tax in this proceeding.

Respectfully submitted,

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THOMAS H. FISHER,
Of Counsel.